



Legal Update

May 2015

The SJC ruled that the police failed to provide sufficient information to establish probable cause to believe that Canning was not properly registered to possess or cultivate marijuana under the 2012 medical marijuana statute.

Commonwealth v Josiah Canning, SJC No. 11773 (2015):

Background: On May 30, 2013, the defendant, Josiah H. Canning, (hereinafter referred to as “Canning”) was charged with possession with the intent to distribute marijuana, distribution of marijuana, and conspiracy to violate the drug laws. Yarmouth police arrested Canning and charged him after they executed a search warrant for Canning’s home in Brewster. After receiving information from a confidential informant that Canning had an indoor “marijuana grow” operation, Detective Kent of the Yarmouth Police Department verified that Canning lived at suspected residence. Detective Kent began conducting surveillance of the property and noted that dark material obstructed the windows and that there was an aluminum flexible hose protruding out. A strong odor of “freshly cultivated” marijuana was emanating from the house and Canning along with another man had purchased “large amounts of indoor marijuana grow materials” from a “hydroponic shop.” Additionally, utility bills confirmed that the average kilowatt usage for Canning’s home was 3,116.5 which exceeded the kilowatt usage for three neighboring homes which registered at 542.3 kilowatts. The utility bills for Canning and the neighboring towns were tracked for the same amount of time. Detective Kent detailed in his affidavit that based on his training and experience, marijuana growing operations require different types of electrical equipment, e.g., “high intensity discharge lamps, fluorescent lights, fans, reflectors, irrigation and ventilation equipment such as aluminum flexible hose” to be operating consistently, high usage of electricity -- a “noticeable increase in kilowatt usage” -- is to be expected. When the search warrant was executed, police seized seventy (70)

marijuana plants, eleven fluorescent industrial lights, an aluminum flexible hose, a digital scale, approximately 1.2 pounds of marijuana, and a large amount of cash. Police arrested Canning and he filed a motion to suppress the evidence.

The motion judge allowed the motion and concluded that although Detective Kent's affidavit "established probable cause that marijuana was being cultivated indoors at Canning's home," it failed to establish that Canning was not authorized to grow marijuana in his home. When *An Act for the Humanitarian Medical Use of Marijuana* passed, procedural aspects regarding hardship cultivation licenses made it challenging for police to verify who was authorized to grow marijuana in their homes. Since police failed to demonstrate that Canning did not have a lawful hardship cultivation license, the motion judge concluded that Canning was not committing an illegal act. The Commonwealth filed an interlocutory appeal and the SJC allowed a motion for direct appellate review.

Conclusion: The SJC agreed with the motion judge's findings and held that the police failed to establish that Canning was illegally growing marijuana in his home. The key issue that the SJC considered in the wake of the passage of *An Act for the Humanitarian Medical Use of Marijuana*, was whether the police can obtain a search warrant for a property where they suspect an individual is cultivating marijuana by establishing probable cause that cultivation is taking place or whether police are required to establish probable cause that the individual is not registered or licensed to grow marijuana.

In 2012, *An Act for the Humanitarian Medical Use of Marijuana*, passed and legalized the use of marijuana for medical reasons without punishment. According to St. 2012, c. 369, § 2 (I), "medical use of marijuana shall mean the cultivation, possession, processing (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfer, transportation, sale, distribution, dispensing, or administration of marijuana, for the benefit of qualifying patients in the treatment of debilitating medical conditions, or the symptoms thereof." The Department of Public Health is the agency that administers registrations and licenses for nonprofit medical marijuana treatment centers, medical marijuana center dispensary agents, and qualifying patients and personal caregivers that dispense marijuana for medical use. See *Id.* At §§ 9-12. While the language from the *Act* implies that nonprofit medical marijuana treatment centers or dispensaries will be the principal source for dispensing marijuana, the *Act* provided that qualifying patients and personal caregivers can cultivate marijuana at home under a hardship cultivation license. See *Id.* at §§ 2 (H), 9 (B), (C). The hardship cultivation license only allows that the patient or the patient's personal caregiver to cultivate to produce and maintain a sixty-day supply of marijuana as permitted within the *Act*. *Id.* at § 11.

1st Issue: Did police have probable cause to establish that Canning was illegally growing marijuana in his home or that he did not have a license to grow marijuana in his home?

The SJC first considered the four corners of the warrant's affidavit to determine whether there was sufficient information to establish probable cause to search Canning's home. The Commonwealth argued that Canning needed a license or certification to demonstrate he was authorized to lawfully grow marijuana in his home but the SJC disagreed in light of the passage of *An Act for Humanitarian Medical Use of Marijuana*. The Commonwealth further argued cultivating "all or any" amount of marijuana in a person's home is still illegal even under the passage of the *Act*.

According to the language of *An Act for the Humanitarian Medical Use of Marijuana*, a person can lawfully cultivate a sixty day supply of marijuana as long as the person has a written certification for medical marijuana use. During the implementation of the Act, the Department of Public Health posted at memorandum entitled "*Guidance for Law Enforcement Regarding the Medical Use of Marijuana*," that stated "until the Department of Public Health can fully process hardship cultivation applications, "qualifying patients or their caregivers may conduct limited cultivation for a sixty day supply as certified by the patient's physician at their primary residence." See *Department of Public Health, Bureau of Health Care Safety and Quality, Medical Use of Marijuana Program*. (Updated Apr. 15, 2015). Additionally, "the initial certifications for limited cultivation will remain valid until the Department of Public Health can approve or deny applications for the hardship cultivation." 105 Code Mass. Regs. § 725.035(L) (2013). The SJC also acknowledged that while "marijuana cultivation for non-medical purposes remains a crime, under G. L. c. 94C, § 32C (a), the provision of the Act c. 369, § 7 (E), expressly permits a person or entity that is properly registered to cultivate a sixty-day supply of medical marijuana. See St. 2012, c. 369, §§ 9 (B), (D), 11. In this appeal, neither Canning nor the Commonwealth dispute the fact that the Department of Public Health was not approving or denying applications for registration at the time police searched Canning's property and that there were no registered medical marijuana treatment centers in operation.

The second area the SJC examined was whether police had probable cause to conduct an investigatory search of Canning's home because they had information he was growing marijuana there. The SJC compared the circumstances in this case to a lineage of cases that involve whether firearms may be legally possessed with a license but are illegal in the absence of one. See *Commonwealth v. Toole*, 389 Mass. 159, 163 (1983). "The ownership or possession of a handgun or a rifle is not a crime and standing alone creates no probable cause." See *Commonwealth v. Couture*, 407 Mass. 178, 181, cert. denied, 498 U.S. 951 (1990). Although firearms cannot legally be carried without a license to carry, see G. L. c. 269, § 10 (a), in the absence of any evidence beyond the "unadorned fact," that a defendant was carrying a gun, there is no probable cause to suspect a crime was being committed. See, *Id.* Similarly, in the *Marra* case, the Court reversed a conviction charging a defendant for illegally storing dynamite without a license because the search warrant authorizing the search of defendant's trailer was not based on probable cause. See *Commonwealth v. Marra*, 12 Mass. App. Ct. 956, 956-957 (1981). "The observation of a box containing dynamite blasting caps, without more, to indicate that their storage was unlicensed, does not provide probable cause for entry into the defendant's trailer." See *Id. At* 957.

The SJC concluded that the provisions of the *Act* "make it abundantly clear that its intent is to protect the lawful operation of the medical marijuana program established by the legislation from all aspects of criminal prosecution and punishment, including search and seizure of property as part of a criminal investigation." See *St. 2012, c. 369, §§ 1, 3-6*. Furthermore, the *Act's* medical marijuana program is structured as a licensing or registration system, and "expressly allows the lawful possession, cultivation, and distribution of marijuana for medical purposes by a number of different individuals (and certain nonprofit entities), as long as they are registered to do so." See *St. 2012, c. 369, §§ 1, 3-6*. When considering the *Act*, the facts contained in the affidavit for the search warrant established only that Canning was growing marijuana on the property. Detective Kent's affidavit lacks information addressing whether Canning was registered as a qualifying patient or personal caregiver to grow the marijuana. The affidavit also fails to include other facts or qualified opinions that might

supply an alternate basis to establish the necessary probable cause to believe that home cultivation was unlawful. Based on these factors, the SJC held that the police lacked probable cause to search Canning's home. The SJC further indicated that if the police had provided information that a confidential informant had recently purchased marijuana from Canning police may have been able to establish the requisite probable cause to search the property for evidence of unlawful cultivation. Some additional factors that the SJC highlighted as helpful in establishing probable cause would have been if the police had provided information that they had observed marijuana plants growing on the property that in the opinion of a properly qualified affiant, exceeded the quantity necessary to grow a sixty-day supply of ten ounces. Because none of these factors were included in the affidavit, the motion judge concluded that the police did not have probable cause to conduct an investigatory search of Canning's home.